UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
	:	Case Nos. 00 B 41065 (SMB)
RANDALL'S ISLAND FAMILY GOLF CENTERS, INC., et al.	:	through 00 B 41196 (SMB)

Debtors.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on February 13, 2001, The City of Los Angeles, Department of Parks and Recreation (the "City") filed with the United States Bankruptcy Court for the Southern District of New York its attached Motion to for Relief from the Automatic Stay to Effectuate Setoff ("the Motion") seeking the authorization to effectuate a setoff of $168,500 in pre-petition claims against a pre-petition security deposit tendered by the Debtor, Encino/Balboa Family Golf Centers, Inc., to the City.

PLEASE TAKE FURTHER NOTICE that objections to the Motion, if any, must be in writing, filed with the Court and received by counsel for The City, Pryor Cashman Sherman & Flynn, 410 Park Avenue, New York, New York 10022, Attn. Carole Neville no later than February 26, 2001 at 12 p.m. The Court has scheduled a hearing on March 1, 2001 at 10 a.m. at the United States Bankruptcy Court, One Bowling Green, New

York, New York before The Honorable Stuart M. Bernstein to consider the relief requested in the Motion. The Court may decline to consider any objection that is not timely and properly filed and served.

DATED: February 13, 2001 PRYOR CASHMAN SHERMAN & FLYNN LLP

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Hearing Date
March 1, 2001
at 10:00 a.m.

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Debtors.

MOTION OF CITY OF LOS ANGELES FOR RELIEF FROM THE AUTOMATIC STAY TO EFFECTUATE SETOFF

The City of Los Angeles, Department of Recreation and Parks (the "City"), by and through its undersigned counsel, hereby moves the Court for entry of an order prusuant to Sections 362 and 553 of the Bankruptcy Code modifying the automatic stay for the purpose of authorizing the City to effectuate a setoff of $168,500 against the Debtor's tendered cash security deposit. In support of this motion, the City states as follows:

1. This motion is made pursuant to Sections 362(d) and 553(a) of Title 11 of the United States Code (the "Bankruptcy Code") and pursuant to Federal Rules of Bankruptcy Procedure 4001(a)(1) and 9014 and Rule 4002-1 of the Local Rules of the Court.

2. This Court has jurisdiction to hear and determine this motion pursuant to 28 U.S.C. Sections 157(a), (b)(1) and (b)(2)(A), (G) and (O).

3. In November of 1999, the City and the Encino/Balboa Family Golf Centers, Inc. (the "Debtor") entered into a concession contract (the "Concession Contract") for the operation of a golf pro shop and driving range at Encino/Balboa Golf Complex (the "Complex"). A copy of the Concession Contract is attached hereto as Exhibit A.

4. The Concession Contract provides that the Debtor shall have the exclusive right for ten (10) years to use the golf shop and driving range for the sale of golf related equipment and for the operation of a golf driving range. Further, the Debtor covenanted and promised to make capital improvements to the Complex in an amount of not less than $1,670,000 (the "Capital Improvements") which promise the Debtor has failed to perform.

5. In exchange, the Debtor agreed to pay a monthly fee of the greater of 1/12th of $650,000 plus utility charges or a percentage of gross income. To secure its obligations to the City, the Debtor provided a cash security deposit of $168,500 (the "Performance Deposit").

6. On or about May 4, 2000, the Debtor and various related entities commenced by the voluntary filing of petitions under Chapter 11 of the Bankruptcy Code the above captioned bankruptcy case (the "Petition Date"). The cases were subsequently consolidated for administrative purposes.

7. On May 15, 2000, the Debtor failed to pay to the City the rent and utility charges due for the month of April, 2000 under the Concession Contract in the amount of $58,250. On June 15, 2000, the Debtor failed to pay the rent and utility charges due for the period of May 1-4, 2000, of $5,637.15. Accordingly, as of the Petition Date, there are rent and utility charges in the amount of $63,887.15 owing by the Debtor to the City under the Concession Contract.

8. These sums for rent and utility charges remain due and owing, with interest accruing

thereon at the Concession Contract rate of 18% per annum. Therefore, as of January 31, 2001, the total pre-petition arrearage for rent and utility charges will amount to a total of $73,394.90.

9. The Debtor also failed to commence construction of the Capital Improvements by November 20, 2000, when permits were available, as required by the Concession Contract. On December 1, 2000, the Debtor notified the City in writing that notwithstanding its prior assurances, it did not intend to honor its obligations under the Concession Contract to construct the Capital Improvements. Rather, the Debtor indicated it was looking for an assignee to undertake its obligations under the Concession Contract. Accordingly, the City has been harmed by the Debtor's failure to timely perform these express obligations of the Concession Contract in the amount not less than $1,670,000.

10. The Debtor also failed to pay post-petition amounts due under the Concession Contract. On January 15, 2001, the Debtor failed to pay the rent and utility charges due for the month of December, 2000, in the amount of $58,250. An additional $58,250 will be due for the month of January on February 15, 2001. At the February 6, 2001 court hearing, the Debtor indicated that it would not tender this payment. The additional amount of $116,500 owed for post-petition payments under the Concession Contract is an administrative expense of the Debtor's bankruptcy estate.

11. The Debtor has or will shortly reject the Concession Contract giving rise to other damages.

12. The City has and will continue to suffer harm both non-monetary and monetary by reason of the Debtor's failure to perform its obligations under the Concession Contract.

ARGUMENT

13. The Code provides generally that a creditor is permitted to setoff pre-petition debts due the creditor by the debtor against pre-petition debts due the debtor by the creditor, where the debts are mutual. See 11 U.S.C. § 553(a); Newbery Corp v. Fireman's Fund Ins. Co., 95 F.3d 1392, 1398 (9th Cir. 1996).

14. "[A] right of setoff is a remedy that has long been recognized and enforced in the commercial world at large, as well as under every one of the nation's bankruptcy acts. Creditors . . . have long relied on the existence of the right. The Bankruptcy Code recognizes the significance of the right and continues the practice of preserving it, in part as a matter of essential fairness, but more importantly in recognition of the right as a party of the bundle of substantive rights that may comprise a creditor's claim." 5 Collier on Bankruptcy, ¶553.02[2], 553-9 and 10 (15th ed. rev. 2000); citing Cumberland Glass Mfg. Co. v. DeWitt & Co., 237 U.S. 447, 454-55, 35 S. Ct. 636, 639, 59 L.Ed. 1042, 1046 (1915); Studley v. Boylston National Bank of Boston, 229 U.S. 523, 528, 33 S. Ct. 806, 808, 57 L.Ed. 1313, 1316 (1913); Bohack Corp. v. Borden, Inc. (In the Matter of The Bohack Corp.), 599 F.2d 1160, 1164 (2nd Cir. 1979); New Jersey National Bank v. Gutterman (In re Applied Logic Corp.), 576 F.2d 952, 957-958 (2nd Cir. 1978); North Chicago Rolling-Mill Co. V. St. Louis Ore & Steel Co., 152 U.S. 596, 616, 14 S. Ct. 710, 715-16, 38 L.Ed. 565, 572 (1894); , 14 S. Ct. 710, 715-16, 38 L.Ed. 565, 572 (1894); Carolco Television, Inc. v. De Laurentiis Entertainment Group, Inc. (In re. De Laurentiis Entertainment Group, Inc.), 963 F.2d 1269, 1277 (9th Cir. 1992); Turner v. United States (In re G.S. Omni Group, Inc.), 835 F.2d 1317, 1318 (10th Cir. 1987); United States v. Brunner (In re Brown), 282 F.2d 535, 537 (10th Cir. 1960); In re Progressive Wallpaper

Corp., 240 F. 807, 711 (N.D.N.Y. 1917); Boston & Maine Corp. v. Chicago Pac. Corp., 785 F.2d 562, 565 (7th Cir. 1986).

15. "Consistent with the text of Section 553, the best statement of modern law and practice is that, if the relevant claim and debt constitute mutual obligations within the meaning of section 553, a right of setoff should be recognized in bankruptcy unless the right is invalid in the first instance under applicable non-bankruptcy law, or unless it is otherwise prescribed by some express provision of the Code." 5 Collier on Bankruptcy, ¶553.02[3], 553-11 and 12 (15th ed. rev. 2000). See also Posey v. U.S. Dep't of Treasury, 156 B.R. 910 (W.D.N.Y. 1993)(finding that the three elements of setoff are 1) debt owed by creditor to debtor which arose prior to the commencement of the bankruptcy case, 2) claim of creditor against debtor which arose prior to commencement of the bankruptcy case, and 3) debt and claim must be mutual obligations.)

16. "The right of setoff . . . allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A" Citizen Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S. Ct. 286, 289, 133 L.Ed.2d 258 (1995); see also Bohack Corp. v. Borden, Inc., 599 F.2d at 1164 (observing that setoff "occupies a favored position in our history of jurisprudence"); In re Utica Floor Maintenance, Inc., 41 B.R. 941, 944 (N.D.N.Y. 1984)(a creditor's right of setoff should be subject to interference by the courts "only under the most compelling circumstances"); In re Applied Logic Corp., 576 F.2d at 957 ("the rule allowing setoff . . . is not one that courts are free to ignore when they think application would be 'unjust'")

17. The Bankruptcy Appellate Panel for the Second Circuit has strongly endorsed setoff in bankruptcy, stating that:

> [A] court should not disturb an otherwise valid setoff unless compelling circumstances require it. A decision disallowing a setoff must not be made cavalierly.

In re The Bennett Funding Group, Inc., 212 B.R. 206, 216 (2nd Cir. BAP 1997), aff'd, 146 F.3d 136 (2nd Cir. 1998); see also In re Whimsy, Inc., 221 B.R. 69, 74 (S.D.N.Y. 1998)("a court should enforce the remedy of setoff unless compelling circumstances require the disallowance of setoff"); In re Tilston Roberts Corp., 75 B.R. 76, 79 (S.D.N.Y. 1987)(the Second Circuit has repeatedly favored the allowance of setoffs and has noted specifically its reluctance to disturb the Bankruptcy Code's policy of allowing setoffs unless compelling circumstances require it"); In re Blanton, 105 B.R. 321, 337-38 (Bankr. E.D. Va. 1989)(most cases in which courts have exercised discretion to deny setoff outright have involved creditors who engaged in illegal or fraudulent conduct").

18. The three elements for enforcing the remedy of setoff to the City are satisfied here. The Performance Bond was tendered by the Debtor to the City prior to the commencement of the Debtor's bankruptcy case. The City claims reimbursement from the Debtor for amounts which arose prior to the commencement of the Debtor's bankruptcy case. The Performance Bond and the amounts owed by the Debtor to the City both arise under the Concession Contract. Clearly, the City's pre-petition claim is entitled to set off against the Performance Bond.

19. The City should be entitled to relief from the automatic stay for cause to allow it to exercise its remedy of setoff. There exist no compelling circumstances to deny the City the remedy of setoff. The City simply seeks to offset a small fraction of the harm it is incurring by virtue of Debtor's failure to honor its obligations under the Concession Contract.

20. The City further requests that given the legal authorities cited herein, the Court dispense

and waive the requirement contained in Local Rule 9013-1(b) for submission of a separate memorandum of law.

CONCLUSION

Wherefore the City of Los Angeles respectfully requests that this Court grant the City's Motion and enter an Order modifying the automatic stay in this Chapter 11 case for the purpose of authorizing The City of Los Angeles to offset its pre-petition damage claims in the amount of $168,500 against the Performance Bond, and for such other relief as is appropriate in the circumstances.

DATED: February 13, 2001 PRYOR CASHMAN SHERMAN & FLYNN LLP

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